

DISTRICT OF MAINE

Civil No. 89-293 P

Before the court are the defendant's motions for (1) summary judgment on Counts I through VI for failure to establish essential elements of the claims, (2) partial summary judgment on Count VII for failure to demonstrate severe emotional distress which would be compensable under Maine law, and (3) summary judgment on the Count VIII claim for punitive damages. The plaintiff asserts that

summary judgment is inappropriate on all but the punitive damages claim¹ because there remain genuine issues of material fact. Both parties have submitted statements of material facts on the contested claims in accordance with Local Rule 19.

I. FACTS

The essential facts may be summarized briefly. The decedent injured his leg on Thursday, April 14, 1988. Deposition of Mary L. Fletcher ("Fletcher Deposition"), Vol. I at 41-43. At the time of his injury, he was a school bus driver. Fletcher Deposition, Vol. II at 58. The decedent sustained his injury when he scraped or cut his leg on the school-bus driver's seat. *Id.*, Vol. II at 65-66, 75. No one witnessed the injury in question. *Id.*, Vol. I at 61, Vol. II at 65; Plaintiff Mary Fletcher's Answers to Interrogatories Propounded by the Defendant ("Plaintiff's Answers") & 24. When the decedent returned home from work on April 14, he told his wife that he had been injured. Fletcher Deposition, Vol. I at 41-42. She advised him to treat the injury with an ointment. *Id.*, Vol. I at 42, 45. After treating his injury, the decedent and the plaintiff left for Augusta, Maine to attend a political convention. *Id.*, Vol. I at 40, 45-46. On Sunday, April 17, the decedent complained that he was not feeling well. *Id.*, Vol. I at 51. He awoke on Monday with a red, swollen leg and sore throat. *Id.*, Vol. I at 52-53. The decedent was admitted to the hospital the same day. *Id.*, Vol. I. at 52-54, Vol. II at 69-71. He died on April 30, 1988. *Id.*, Vol. I at 65. The cause of death was an acute pulmonary embolism. Deposition of Dr. Edward A. McAbee, Jr. ("McAbee Deposition") at 61, 74. The

¹ The defendant's separate motion for summary judgment on Count VIII is unopposed. The plaintiff's counsel has advised the court by telephone that the plaintiff consents to the entry of summary judgment in the defendant's favor on the punitive damages claim.

plaintiff has not received any psychological or psychiatric therapy as a result of her husband's death. Fletcher Deposition, Vol. II at 54-55; Plaintiff's Answers && 33-37.

The bus driven by the decedent at the time of the injury ("bus #20") has been maintained by Hilton's Mobil Station in South Berwick, Maine since it was acquired new in 1979. Fletcher Deposition, Vol. II at 58; Deposition of Warren H. Hilton ("Hilton Deposition") at 4-6. Bus #20 was previously driven by Geraldine Martel, who has also been a secretary for Hilton's Mobil Station since 1982. Deposition of Geraldine E. Martel ("Martel Deposition") at 3-4, 6-8.

II. SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56(c), the court shall grant summary judgment if there remains "no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment must show an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the facts in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.*; Fed. R. Civ. P. 56(e). A fact is "material" if it may affect the outcome of the case and the dispute is "genuine" only if the evidence is conflicting and a trial is required to resolve the disagreement. *Ortega-Rosario*, 917 F.2d at 73.

III. MOTION FOR SUMMARY JUDGMENT ON COUNTS I-VI

The defendant argues that it is entitled to summary judgment on Counts I-VI because (1) the only evidence available to the plaintiff to establish the decedent's injury is inadmissible hearsay and (2) the plaintiff cannot demonstrate that the allegedly defective product -- the school-bus driver's seat -- had not been modified since it left the defendant's control. Thus, the defendant asserts, the plaintiff cannot establish two central elements of her prima facie case: that an injury occurred and that the defendant's original product caused the injury.²

A. Inadmissible Hearsay

It is settled law that one of the elements a plaintiff must prove in a negligence claim is actual harm. The defendant argues that the only evidence which the plaintiff presents to establish the decedent's injury is her own statement that the decedent told her he hurt his leg on the school bus. *See* Fletcher Deposition, Vol. II at 66. The defendant contends that this is inadmissible hearsay under Fed. R. Evid. 801(c) and 802, and that none of the hearsay exceptions apply.

The evidence proffered by the nonmoving party to establish the existence of a factual dispute must be admissible at trial. "Material that would be inadmissible at trial cannot be considered on a motion for summary judgment because, if offered at trial, it would not serve to establish a genuine issue of material fact." *Finn v. Consolidated Rail Corp.*, 782 F.2d 13, 16-17 (1st Cir. 1986) (citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ' 2727 at 156 (1983)). Thus, "[h]earsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment. . . . [A]bsent a showing of admissibility . . . [the nonmoving party] may not rely on rank hearsay . . . to

² The defendant has not challenged the sufficiency of the evidence with respect to other elements of the causes of action.

oppose proper motions for summary judgment." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). Therefore, I must first establish the admissibility of the plaintiff's evidence before determining whether a genuine factual dispute exists on the issue of actual harm.

While the plaintiff admits that the statement in question is hearsay, *see* Plaintiff's Memorandum of Law in Support of Objection to Defendant Carpenter Body Works, Inc.'s Motion for Summary Judgment ("Plaintiff's Opposition Memorandum") at 4, she argues that it falls within several hearsay rule exceptions. The first such exception is delineated in Evidence Rule 803(3) and covers a "statement of the declarant's then existing . . . physical condition (such as . . . pain, and bodily health)" The plaintiff quotes 11 *Moore's Federal Practice* ' 803(3)[5] at VIII-83 ("Moore's") for the proposition that this exception "codifies the traditional rule that a witness may testify to another person's declarations of then-existing physical condition." The plaintiff refers to a case cited in *Moore's* wherein the Supreme Court upheld the admissibility of the decedent's statements, testified to by his wife and son, that he had hurt his head when he fell down a stairway.³ The Court determined that if an individual's bodily feelings are material to the case "the usual expressions of such feelings are competent evidence." *See Mosley*, 75 U.S. at 404. "The admissibility of extra-judicial declarations of then existing pain and bodily condition under Rule 803(3) is consistent with the federal practice prior to the enactment of the rule and with the 'majority rule' of the states." *Moore's* ' 803(3)[5] at VIII-83 (footnotes omitted). In the instant case, the decedent returned home from work on April 14, 1988 and told the plaintiff that he had injured his leg from contact with the driver's seat on the bus. The decedent was expressing his then existing physical

³ *Travelers Ins. Co. v. Mosley*, 75 U.S. 397 (1869).

condition. I find on the present record that this statement is not excludable hearsay by force of Rule 803(3).

Another exception asserted by the plaintiff is found in Rule 803(4) which encompasses statements made for the purpose of medical diagnosis or treatment. The Advisory Committee notes instruct that this exception extends to statements of causation which are reasonably pertinent to diagnosis and treatment. "[T]he statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Notes of Advisory Committee on Proposed Rules found in West's *Federal Civil Judicial Procedure and Rules* at 326 (1990). The plaintiff testified that when her husband arrived home she looked at his leg and suggested that he apply an ointment to the wound. I infer from this that the decedent was eliciting his wife's opinion regarding treatment of his injury. Consequently, I find, again on the present record, that his statement falls within this hearsay exception as well.

Finally, even if the decedent's statement did not fall within any specific exception to the hearsay rule, I conclude that, on this record, it would be admissible under two "residual" rules: Rule 803(24) and Rule 804(b)(5).⁴ These two exceptions are applicable if the court determines that (1) the statement is trustworthy; (2) it is offered as evidence of a material fact; (3) it is more probative than other evidence available to the proponent; and (4) the interests of justice would be best served by its admission. Viewing the facts in the light most favorable to the plaintiff, there is no reason for the court to question the trustworthiness of the decedent's statement. At the time that it was made, the decedent was simply informing his wife of the circumstances surrounding his injury. In fact, the plaintiff testified that neither she nor the decedent was particularly alarmed by the injury at the time. Contrary to the

⁴ These exceptions parallel each other in every way except that 804(b)(5) applies only when the declarant is unavailable. The decedent here is obviously unavailable. *See* Rule 804(a)(4).

defendant's allegations, I do not find that the decedent's statement is self-serving. It is highly unlikely that the decedent came home that day and told his wife that he injured his leg in anticipation of this lawsuit. No one else saw the decedent's injury the day it occurred. He was not treated by a doctor until several days later. Therefore, the only evidence available as to the material fact of an injury is the plaintiff's recounting of what the decedent told her that day. For this reason, I find that justice would be best served by allowing the statement into evidence under either of the residual rules.

The circumstances surrounding the decedent's personal injury claim is not only a material fact but central to the plaintiff's case. Because I find that on the present record the decedent's statement is not excludable hearsay, it can be used as probative evidence of injury. I conclude that the plaintiff has presented admissible evidence from which a jury could find that the decedent did, in fact, sustain an injury on August 14, 1988.

B. Condition of the Product

A cause of action for strict liability in Maine is governed by 14 M.R.S.A. ' 221. This section holds a seller liable if, among other factors, the product sold is defective at the time of sale and reaches the user or consumer ``without significant change in the condition in which it is sold." Thus, in order to recover under a strict liability claim the plaintiff must show, in part, that the injury resulted from the condition of the product and that the condition of the product was unchanged from the time it left the manufacturer's control to the time of the injury. *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 623 (Me. 1988).

The defendant argues that the plaintiff has not produced, and is unable to produce, any substantive evidence demonstrating that the driver's bus seat was not altered after it left the defendant's control. The plaintiff counters that there is indeed evidence showing that the bus seat was unchanged

from the time it left the defendant's control to the time of the decedent's injury. This disputed fact, the plaintiff argues, precludes summary judgment.

The plaintiff has offered the deposition of Geraldine Martel in support of her claim that the bus driver's seat in question has remained unaltered since it was newly purchased by the school district. Ms. Martel was the first person to drive bus #20 when it was purchased from the defendant in 1980. Martel Deposition at 6, 8. In addition, she worked part-time as a secretary for Hilton's Mobil Station while she was a bus driver and has been working full time for Hilton's since 1982. Martel Deposition at 6, 8. Hilton's is responsible for the maintenance and repair of bus #20. Martel Deposition at 3-5. Ms. Martel testified that from the time the bus was purchased from the defendant to the date of her deposition the records at the service station indicate that there have been no modifications or repairs to the driver's seat on bus #20. Martel Deposition at 8-9.

The plaintiff also offers the deposition of Warren H. Hilton, the owner of Hilton's Mobil, to support her claims. Mr. Hilton testified that his service station has maintained bus #20 ``since it was brand new . . . 1979." Hilton Deposition at 5. He further testified that, to his knowledge, the driver's seat on bus #20 has not been changed, Hilton Deposition at 9-10, 12, and that ``it's just the same way as it was when it came right from the factory," Hilton Deposition at 10.

While the defendant asserts that the plaintiff's expert witness could only testify to repairs made after April 1984, *see* Defendant's Memorandum at 7, it ignores the deposition of the two preceding witnesses who have testified to the service record of bus #20 since it was newly purchased in 1979.

The defendant's own representative, Dirk C. Verheul, testified that Carpenter Body Works manufactured the body, component seat parts and seat base of bus #20 and also assembled the seat. Verheul Deposition at 18. Mr. Verheul confirmed that bus #20 was manufactured in 1979. Verheul Deposition at 23. The defendant suggests that, because Mr. Verheul testified that the driver's seat on

bus #20 had a different dimension than the seats typically manufactured by Carpenter Body works, *see* Verheul Deposition at 58-59, the seat was not in the original condition existing when it left the defendant's plant. However, that is not a dispositive conclusion. It is plausible that the seat was simply manufactured with different dimensions for any number of reasons. I do not find Mr. Verheul's testimony conclusive on this point. In fact, Mr. Verheul did not draw any final opinion or conclusions regarding the original condition of the driver's seat on bus #20.

Finally, the defendant implies that the testimony of the plaintiff's expert, Wilson G. Dobson, regarding the condition of the seat is unreliable because his opinion was not based on an "independent analysis." Defendant's Memorandum at 7. However, Mr. Dobson did examine the seat in question. Dobson Deposition at 32. He visually and tactically inspected the seat and testified that, based on his examination and review of the depositions of Mr. Verheul and Eric Kulickowski,⁵ he believes the driver's seat on bus #20 "is the original seat installed in the vehicle, and it's installed in its original position." Dobson Deposition at 102. In accordance with Evidence Rule 703, it is proper for an expert witness in forming his opinion to draw on his firsthand observations as well as any information provided to him from other sources. In this case, for example, Mr. Dobson properly relied in part on the testimony of another engineer, Mr. Verheul.

⁵ Eric Kulickowski is president of Scully's Auto and Marine Upholstery. *See* Kulickowski Deposition at 3. Scully's has done some upholstery work on bus #20. *Id.* at 4.

I find that the evidence produced by the plaintiff is probative as to the condition of the seat at the time of the injury. In fact, Mr. Dobson's opinion is that the condition of the seat could have caused the decedent's injury. After several pages of testimony discussing the position of the seat to accommodate the decedent's body⁶ and the general design of the seat, Mr. Dobson's considered opinion is that the driver's seat on bus #20 had an "unreasonably sharp" protruding edge; that the location of the decedent's injury would be consistent with the protruding edge; that the potential for injury from the protruding edge was foreseeable; and that the sharp edge could have been eliminated by certain modifications. Dobson Deposition at 89-90.

Based on the foregoing evidence, I find that a genuine issue of material fact exists as to the condition of the bus seat from the time it left the manufacturer's control to the time of the decedent's alleged injury. Therefore, the defendant's motion for summary judgment should be denied.

⁶ Testimony has revealed that bus #20 was the only bus the decedent could drive because he was unable to fit behind the steering wheel of the other buses. Hilton Deposition at 6, 14.

IV. MOTION FOR PARTIAL SUMMARY JUDGMENT

The defendant has also filed a motion for partial summary judgment on Count VII which alleges negligent infliction of emotional distress.⁷ The defendant asserts that it is entitled to a judgment as a matter of law because Maine law does not support the plaintiff's claim.⁸ The defendant argues that the plaintiff is not entitled to recover on this claim because she was not at the scene of the accident and did not subsequently receive medical treatment, counselling or other therapy as a result of her husband's death. The plaintiff asserts that Maine law does not require that she have been at or near the scene of the accident and that, in any event, she has in fact suffered severe emotional distress as a result of her husband's death. The plaintiff argues that the defendant has misstated Maine law on this issue and that the facts of this case make it an appropriate question for a jury.

Maine's wrongful death statute does not preclude a claim for negligent infliction of emotional distress. *See* 18-A M.R.S.A. § 2-804. Maine's Law Court has `long recognized that emotional distress constitutes a compensable injury." *Purty v. Kennebec Valley Medical Center*, 551 A.2d 858, 859 (Me. 1988); *see also Gammon v. Osteopathic Hosp. of Maine*, 534 A.2d 1282, 1283 (Me. 1987); *Rowe v. Bennett*, 514 A.2d 802, 807 (Me. 1986).

⁷ The defendant asserts that the plaintiff's memorandum of law opposing this motion was not timely filed. This is unfounded. The plaintiff met the filing requirements under Local Rule 19(c) when she filed her objection on December 6, 1990.

⁸ Both parties' memoranda discuss whether the decedent's son, Shawn Fletcher, may also recover under this claim. However, Shawn is not a named plaintiff in this action, nor does plaintiff Mary Fletcher purport to represent his interests derivatively in connection with this claim.

The Law Court's most recent discussion on this issue is found in *Bolton v. Caine*, No. 5646 (Me. Dec. 18, 1990). There the Law Court stated that, "[p]rior to *Gammon* and *Rowe*, compensation for emotional distress was provided only 'when the emotional distress [was] intentionally or recklessly inflicted, when the emotional distress result[ed] from physical injury negligently inflicted, or when negligently inflicted emotional distress result[ed] in physical injury.'" *Bolton*, No. 5646, slip op. at 5 (quoting *Gammon*, 534 A.2d at 1283). The Law Court indicated that Maine law had required some showing of "physical impact," "underlying or accompanying tort," "objective manifestation," or "special circumstances" in order to recover on an emotional distress claim. *Id.* at 6. The *Gammon* court abandoned this position, stating that "arbitrary requirements should not bar [a plaintiff's] claim for compensation for severe emotional distress." *Gammon*, 534 A.2d at 1283. The Law Court's inclination to abandon "artificial devices" in favor of reliance on the trial process to resolve psychic harm claims was reasserted in the *Bolton* decision when the court stressed that "[fact-finders] will be able to evaluate the impact of psychic trauma with no greater difficulty than pertains to assessment of damages for any intangible injury." *Bolton*, slip op. at 6 (citation omitted). The Law Court restated that it would rely on the traditional foreseeability test in assessing emotional distress claims. *Id.*

Given the Law Court's current framework, I find that, when viewing this record in the light most favorable to the plaintiff, a factual dispute exists as to the foreseeability of infliction of emotional distress on the plaintiff, as well as the severity of the plaintiff's distress. The defendant argues that the plaintiff's emotional trauma was not severe enough to warrant recovery on this claim because she cannot produce any evidence of psychological or psychiatric therapy, nor was she diagnosed with any physical ailments resulting from her distress. Fletcher Deposition, Vol. II at 54-55. However, the Law Court has instructed that a plaintiff does not need to show physical manifestations of emotional distress

in order to recover damages. *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 437 (Me. 1982).

Further, I have not discovered any case law which requires that a plaintiff produce evidence of counselling or other therapy in order to prove that she has experienced severe emotional distress.

Whether or not the defendant could have foreseen the emotional impact of the decedent's death on the plaintiff is a question best left to a jury. The decedent's injury took place on the same day he and the plaintiff were leaving for a convention. They attended the convention with the decedent in seemingly good health. Upon returning home the decedent suddenly became very ill and was admitted to the hospital the next day. Less than two weeks later he was dead. Assuming that the causation element is established, the facts of this case, buttressed by an opportunity to observe the plaintiff's demeanor, could lead a jury to conclude that the plaintiff has suffered from serious emotional distress over the loss of her husband and that her distress was foreseeable.

V. CONCLUSION

For the foregoing reasons, I conclude that, except as to the punitive damages claim, the plaintiff has demonstrated that there remain genuine and material issues for trial and that the defendant is not entitled to a judgment as a matter of law. Accordingly, I recommend that Defendant's Motion for Summary Judgment on Counts I through VI be **DENIED**, that Defendant's Motion for Partial Summary Judgment on Count VII be **DENIED**, and that Defendant's Motion for Summary Judgment on Count VIII be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for

which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 23rd day of January, 1991.

*David M. Cohen
United States Magistrate Judge*